August 29, 2002

D.T.E. 01-AD-2

Adjudicatory hearing in the matter of the complaint of Debra Canniff relative to the rates and charges for electricity sold by Hull Municipal Lighting Plant.

APPEARANCES: Debra Canniff
556 Nantasket Avenue, Apartment 2
Hull, MA 02045
PRO SE
Complainant

Noreen Campadelli
14 Tad Lane
Cohasset, MA 02025
PRO SE
Landlord

Fern Coyle
Hull Municipal Lighting Plant
15 Edgewater Road
Hull, MA 02045
PRO SE
Respondent

I. INTRODUCTION

On April 10, 2001, an informal hearing was held before the Consumer Division ("Division") of the Department of Telecommunications and Energy ("Department") on the complaint of Debra Canniff ("Complainant" or "Tenant") relative to rates and charges for electricity sold by the Hull Municipal Lighting Plant ("Hull"). The Complainant was dissatisfied with the informal hearing decision and requested an adjudicatory hearing before the Department pursuant to 220 C.M.R. § 25.02(4)(c). The matter was docketed as D.T.E. 01-AD-2.

Pursuant to notice duly issued, an adjudicatory hearing was held on July 26, 2001 at the Department's offices in Boston, in conformance with the Department's Regulations on Billing and Termination Procedures, 220 C.M.R. §§25.00 et. seq. The Complainant testified on her own behalf. The owner of the property in question, Noreen Campadelli ("Property Owner") testified on her own behalf. Hull sponsored the testimony of Fern Coyle, office manager for Hull. The evidentiary record consists of seven exhibits, all of which were introduced by the Department.

II. SUMMARY OF ISSUES

The Complainant seeks recovery of $1,292.73, which represents the total amount that she paid for electricity during the two years prior to the discovery of a violation of the State Sanitary Code ("Code"), 105 C.M.R. § 410.354, at her apartment (Tr. at 56-57). The Complainant contends that recovery of the full amount is warranted and that apportionment is inappropriate (Tr. at 57). Central to the Complainant's argument is her assertion that, although

the Code violation was not discovered until February 9, 1999 (Exh. DTE-1), the violation was ongoing for five years prior to its discovery (Tr. at 57). She argues that because she was forced to pay for a portion of another tenant's electricity for five years, any award less than the maximum legally recoverable would be unfair (Tr. at 57).

The Property Owner asserts that she had no knowledge of a Code violation prior to February 9, 1999 (Tr. at 34, 57), and that she acted immediately to correct the violation (Exh. DTE-2). Accordingly, The Property Owner argues that she is responsible only for the difference between the cost of electricity billed to Complainant, and the cost of the electricity actually used by Complainant (Tr. at 58).

III. SUMMARY OF FACTS

A. Complainant

The Complainant testified that she currently is a tenant at 556 Nantasket Avenue, Apartment 2, in Hull, Massachusetts (Tr. at 2), and that she has resided there since May 1, 1994 (id. at 9). The Complainant claims that her electricity usage was not unusual or excessive, and that her electrical appliances included a refrigerator, a toaster oven, a microwave oven, and an air conditioner (id. at 20). She also stated that her electric bills seemed excessive from the time she began occupancy of the premises (id. at 9). The Complainant stated that she contacted Hull to complain of high bills, although she was unsure of the exact date, and was put on a payment plan (id. at 10). The Complainant further stated that, in response to her inquiries, Hull sent an employee to check the accuracy of her meter, and found no irregularities; however, she was unsure of the date of the inspection (id. at 18).

The Complainant stated that, in February 1999, she discovered that her apartment was cross-metered with another apartment in her building, Apartment 3 (id. at 12-13). She testified that she reported her findings to the Hull Board of Health ("Board of Health") (id. at 13). According to the Complainant, the Board of Health then sent a building inspector to the premises who confirmed the existence of crossed meters and issued a Code violation citation to the Property Owner (id. at 14; Exh. DTE-1). The Board of Health's report stated that the meter in Apartment 2 was serving some of the circuits in Apartment 3, which provided power for a refrigerator, a freezer, a microwave oven, a toaster oven, one light, and a telephone answering machine (id.; Exh. DTE-1).

The Complainant testified that she believes that the amount in dispute should not be apportioned in any way between herself and the Property Owner (Tr. at 62-63). She stated that she believes the Code violation was ongoing from the beginning of her tenancy until February 1999, a period of five years (id. at 62). She further stated that because her recovery period is limited by regulation to two years, she should be awarded the full amount in dispute, to mitigate her losses incurred during the first three years of the violation (id.).

B. Property Owner

The Property Owner denies any knowledge of the Code violation prior to the issuance of the citation in February 1999 (Tr. at 27). She testified that prior to the discovery of the Code violation, the last time that electrical work was done on the building was in 1978 (id. at 35). She also alleged that the cross-metering situation was deliberately created by another tenant, but could not provide evidence to substantiate this allegation (id. at 34-35).

The Property Owner further contends that she promptly remedied the violation once she became aware of it (Exh. DTE-2). In conclusion, the Property Owner argued that because she acted in good faith and had no prior knowledge that a Code violation existed, she should only be held liable for the amount that the Complainant paid for electricity consumed by the tenant in Apartment 3 (Tr. at 64-65). The Property Owner proposed to apportion the amount in dispute by allocating to the Complainant an amount equal to the Complainant's smallest monthly bill during the two-year violation period, multiplied by twenty-four months (id.). The Property Owner suggested that she would then be liable for the full amount less the amount that she proposed to allocate to the Complainant (id.).

C. Hull

Hull stated that it received a notice of the Sanitary Code violation on February 11, 1999, from the Board of Health, and at that time billed the Property Owner $1,292.73, and then placed the same amount in escrow for a refund to the Tenant pending the Property Owner's appeal (Exh. DTE-7). The $1,292.73 represented the Complainant's total monies paid to Hull for the two years prior to the violation (Exh. DTE-7; Tr. at 8-9).

Hull confirmed that the Tenant had complained about high bills (Tr. at 43). Hull testified, however, that the Complainant's bills for the period of the violation were not beyond what it normally sees for an apartment of similar size (Tr. at 49). Hull testified that it had reread Tenant's meter in response to her complaints regarding high bills (Tr. at 44), but was

unable to provide a record of the second visit (RR-DTE-2). Hull testified that it only flashes[1] meters in new apartments, and furthermore, it does not know if flashing the Tenant's meter would have revealed any cross-metering problems (Tr. at 45-46). Hull concluded by stating that it was not able to propose any method of apportionment (Tr. at 58).

IV. STANDARD OF REVIEW

The Sanitary Code, 105 C.M.R. § 410.354 provides in pertinent part:

> (A) The owner shall provide the electricity and gas used in each dwelling unit unless:
>
> (1) Such gas or electricity is metered through a meter which serves only the dwelling unit or other area under the exclusive use of an occupant of that dwelling unit, except as allowed by 105 CMR 410.254(B); and
> (2) A written letting agreement provides for payment by the occupant.
>
> (B) If the owner is required, by 105 CMR 410.000 or by a written letting agreement consistent with 105 CMR 410.000, to pay for the electricity or gas used in a dwelling unit, then such electricity or gas may be metered through meters which serve more than one dwelling unit.
>
> (C) If the owner is not required to pay for the electricity or gas used in a dwelling unit, then the owner shall install and maintain wiring and piping so that any such electricity or gas used in the dwelling unit is metered through meters which serve only such dwelling unit except as allowed by 105 C.M.R. 410.254(B).

In addition, 105 C.M.R. § 410.254 provides in pertinent part:

> (B) In a dwelling containing three or fewer dwelling units, the light fixtures used to illuminate a common hallway, passageway, foyer and/or stairway may

---

[1] Companies flash a meter by: (1) terminating service within the dwelling unit to discover if additional use is being registered by the meter; and (2) removing the meter from the trough to determine if use from the dwelling unit is not being measured by the appropriate meter. See e.g., Maw v. Massachusetts Electric Company, D.P.U. 90-AD-1, at 6 n.3 (1993).

> be wired to the electric service serving an adjacent dwelling unit provided that if the occupant of such dwelling unit is responsible for paying for the electric service to such dwelling unit:
>
> (1) a written agreement shall state that the occupant is responsible for paying for light in the common hallway, passageway, foyer and/or stairway; and
>
> (2) the owner shall notify the occupants of the other dwelling units.

It is well settled that the Department has jurisdiction to enforce these provisions of the Code, because no substantive or jurisdictional conflict exists between the Department's authority and the authority of the certifying agency which makes a finding whether a Code violation exists. Folloni v. Eastern Edison Company, D.P.U. 92-AD-45 (1994); Eastern Edison Company v. Prybuszauckas, D.P.U. 84-86-64, at 5 (1985); Eastern Edison Company v. MacDonald, D.P.U. 84-86-59, at 5 (1985).

In determining the party responsible for payment for utility service where a violation of the Code is alleged, the Department will not re-litigate the facts underlying a finding of a Code violation but will accept documentation by a certifying agency as probative evidence of the violation. Cahill v. Boston Edison Company, D.P.U. 88-AD-6, at 5-6 (1990). A citation issued by a Certifying Agency to the property owner is presumed accurate, and parties may not contest the accuracy of a citation before the Department. 220 C.M.R. § 29.04(1). Similarly, the Department will not re-litigate the facts underlying a recission of a citation for a Sanitary Code violation. DeAngelo v. Massachusetts Electric Company, D.P.U. 90-AD-10 (1995); Kamarinos v. Massachusetts Electric Company, D.P.U. 90-AD-9 (1994).

As noted, the Code provides that the owner of a residential building must pay for electricity when it is not metered through a single meter serving only one dwelling unit. D.P.U. 84-86-64, at 5; D.P.U. 84-86-59, at 4. The Department has held that any contractual arrangement between the landlord and the tenant for utility service, i.e., a lease agreement, is superseded by the landlord's warranty that rental units are in compliance with the Code. D.P.U. 88-AD-6, at 7; D.P.U. 84-86-59, at 5. The Department has also held that it would be inappropriate to permit a utility to enforce a contract for service against a person who, as a matter of public policy, is without liability. D.P.U. 84-86-64, at 5; D.P.U. 84-86-59, at 5.

Prior to September 27, 1994, in the event of a Code violation, the Department did not apportion the tenant's bill between the tenant and the landlord. D.P.U. 88-AD-6, at 6; see generally D.P.U. 84-86-64; D.P.U. 84-86-59. On September 27, 1994, the Department adopted regulations entitled "Billing Procedures For Residential Rental Property Owners Cited For Violation of the State Sanitary Code 105 C.M.R. § 410.354 or 410.254," which became effective on October 21, 1994. Sanitary Code Rulemaking, D.P.U. 90-280 (1994); 220 C.M.R. § 29.00 et seq. These regulations provide, among other things, that in instances of minimal use, as defined by the regulations, property owners will not be responsible for the full cost of electric or gas service provided to the tenant customer for the retroactive period of the violation of the Sanitary Code, but will be responsible for paying the cost of operating those electric or gas appliances, outlets, or other energy consumption sources cited by the certifying agency as wrongfully connected to the meter serving the dwelling unit of the tenant customer

for the retroactive period of the Code violation. 220 C.M.R. § 29.08; see D.P.U. 90-280, at 5.

Accordingly, relative to requests to appeal the informal decision of the Department's Consumer Division filed on or after October 21, 1994, the effective date of the above regulation, the Department will apportion the tenant's bill between the tenant and the landlord in instances of minimal use, where appropriate. 220 C.M.R. § 29.08 provides in pertinent part:

> (1) Minimal Use Violation(s). A Code violation(s) that individually or in the aggregate includes interior and/or exterior common area illumination (excluding exterior flood light(s)), smoke, fire and/or security alarm(s), door bell(s), cooking range, and common area electrical outlets. If any one or all of these energy users are cited by the Certifying Agency as wrongfully connected to the meter serving the dwelling unit of the tenant customer, provided the Certifying Agency has not also cited the wrongful connection of heating, air conditioning, hot water heating, electrical pump(s), clothes dryer, refrigerator or freezer on the meter serving the dwelling unit, the utility company shall bill the property owner $10.00 per month for the retroactive time period determined pursuant to 220 CMR 29.07(1).

The purpose of the Code is not to penalize unduly an owner of a dwelling or to profit unduly a tenant in a dwelling because of Code violations. See Commonwealth v. Haddad, 364 Mass. 795, 799 (1974) (holding that the primary purpose of the Code is to prevent violations). Furthermore, the Department may grant an exception to any provisions of 220 C.M.R. § 29.00. Whether or not the Department finds that the Code violation is a minimal use violation, the Department may where appropriate apportion the bill between the tenant and landlord if the result under 220 C.M.R. § 29.00 et seq. would otherwise unfairly and unduly

profit or penalize either party. Moruzzi v. Commonwealth Gas Company, D.T.E./D.P.U. 96-AD-6, at 12-13 (2001).

The time period[2] that the property owner is responsible for paying for service previously billed to the tenant resulting from a Code violation is set forth in 220 C.M.R. § 29.07, which states in part:

> (1) Time Period. A utility company shall determine the time period of the property owner's responsibility for paying for service previously billed to the tenant customer resulting from the Sanitary Code violation(s) pursuant to 105 C.M.R. 410.354 and/or 105 C.M.R. 410.254 as the lesser of (a),(b) or (c):
>
> (a) By calculating back two years from the effective date of the citation, pursuant to 220 C.M.R. 29.04(2); or
>
> (b) By referencing back to the date that the tenant customer became customer of record for service to the dwelling unit that is the subject of the violation; or
>
> (c) By reviewing billing history for the dwelling unit that is the subject of the violation over a two year period back from the effective date of the citation, pursuant to 220 C.M.R. 29.04(2) to

---

[2] Historically, the specific beginning date of the landlord's responsibility was determined by the policy and practice, as stated in the decision rendered by the Consumer Division of the Department, following an investigation pursuant to 220 C.M.R. § 25.02(4)(b). Folloni v. Eastern Edison Company, D.P.U. 92-AD-45, at 10-11 (1994). For example, from January, 1992 to October 22, 1994, if a tenancy is for a period greater than two years, the landlord's responsibility began at a point two years prior to the date of the notice of the Sanitary Code violation. Prior to January, 1992, if the tenancy began as much as six years prior to the date of the notice of the Sanitary Code violation, a landlord could be held responsible for a period not to exceed six years. Generally, where there was no evidence as to when the Sanitary Code violation commenced, the landlord's responsibility for electric or gas charges in situations of cross-wiring or cross-piping was calculated from the date the Sanitary Code became effective, September 1, 1983, or the date of the inception of the tenancy, whichever was later, and continued until the time the Sanitary Code violation was corrected, subject to certain time limits. See Krell v. Boston Edison, D.P.U. 91-AD-12 (1995); Tibbetts v. Massachusetts Electric Company, D.P.U. 90-AD-20 (1993); Burns v. Massachusetts Electric Company, D.P.U. 85-13-9 (1985).

> determine the approximate date of commencement of the Sanitary Code violation(s).

The precise ending date of the period of the Code violation is governed by 220 C.M.R. § 29.04(3). Specifically, that section states:

> (a) The effective date of correction of the violation(s) set forth in the citation shall be the actual date of reinspection of the dwelling as referenced in the written correction notice issued by the Certifying Agency to the property owner. The property owner shall give such correction notice to the utility company pursuant to 220 C.M.R. 29.06(3)(e);
>
> (b) If the actual date of reinspection is not referenced in the correction notice, the effective date of the correction of the violation(s) set forth in the citation, shall be the date that appears on the face of the correction notice issued to the property owner;
>
> (c) If more than 30 days elapse between the effective date of the correction and the date of notice to the utility company of such correction, the property owner shall be responsible for paying the electric or gas service provided to the tenant customer until the date that the property owner provides a copy of the correction notice to the utility company.

Unless additional cited violations of 105 C.M.R. § 410.354 and 105 C.M.R. § 410.254 existed in a tenant customer's dwelling unit, that tenant is not entitled to recover a reimbursement for utility payments if the violation pertains to electricity usage not registered on that tenant's meter. 220 C.M.R. § 29.12. That section provides a specific exception:

> When it is shown that some of the electricity and/or gas used in a dwelling unit was registered by a meter other than the meter serving the dwelling unit which is the subject of the violation, and the electric or gas company's records [s]how that the tenant customer was not billed for such usage, the tenant customer shall not recover a reimbursement of

> utility payments on the basis of a Code citation as contemplated by 220 C.M.R. § 29.00.

Id.

V. ANALYSIS AND FINDINGS

The principal issue in this case is whether the Property Owner is obligated to pay for electric service rendered to the Complainant due to a Code violation. If the Department finds that the Property Owner is responsible for the electric service billed to the Complainant, then the Department must also determine the extent and duration of that responsibility.

The Code clearly provides that the owner of a residential rental building must supply and pay for the electricity used in each dwelling unit unless the electricity is metered through a meter which serves only the dwelling unit, except as allowed by 105 C.M.R. § 410.245(B). In this case, the Board of Health inspected the premises in question and found that the Complainant's meter was not only measuring consumption of electricity for her apartment, but for the adjacent apartment, and issued a citation (Exh. DTE-1). The Department therefore finds that a Code violation did occur.

The Department must now determine the duration of the Property Owner's obligation to pay the Complainant's electric bills as a result of the Code violation. Hull stated that, because the date of origin of the violation cannot be determined, it calculated the usage dating back to February 1997, two years prior to the date of the violation, which is the maximum amount of time allowed under 220 C.M.R. § 29.07 (Exh. DTE-7). The Department finds that two years is the appropriate period of obligation for the Property Owner.

The Department must next determine the extent of the Property Owner's responsibility. Under 220 C.M.R. § 29.08(1), property owners are not responsible for the full cost of electric or gas service provided to the tenant where the violation is determined to be a minimal use violation. Here, the Property Owner was cited for cross-metering of circuits that measured consumption for, among other appliances, a refrigerator (Exh. DTE-1). This type of violation is specifically excluded from the minimal use provision of 220 C.M.R. § 29.08, and thus, the Property Owner would normally be responsible for the Tenant's entire electric bill during the period in question. The Tenant argues that she should be awarded the full amount in dispute (Tr. at 63). The Property Owner argues, however, that the Complainant's electric bill for the period in question should be apportioned to distinguish the amount of electricity actually used by the Complainant from the electricity used by the neighboring apartment (Tr. at 64).

It is not the purpose of the Code to penalize unduly an owner of a dwelling or to profit unduly a tenant in a dwelling because of Code violations. Moruzzi, D.P.U./D.T.E. 96-AD-6, at 12; Coleman v. Massachusetts Electric Company, D.P.U./D.T.E. 95-AD-17, at 13 (2001); Haddad, 368 Mass. 795,799 (primary purpose of the Code is to prevent violations); Santana v. Boston Edison Company, D.P.U. 90-21-I (1992); Shimo v. Boston Edison Company, D.P.U. 90-30-I (1992). Under 220 C.M.R. § 29.13, the Department may, wherever appropriate, grant an exception to any provisions of 220 C.M.R. § 29.00. Here, the Complainant testified that she resided at the premises in question during the entire violation period (Tr. at 9). She acknowledged that she consumed electricity during that time (Tr. at 20). The Department finds that requiring the Property Owner to pay the Complainant's entire electric bill for the

period in question is unfair because it unduly penalizes the Property Owner. The Department hereby grants an exception from 220 C.M.R. § 29.07(2) and finds that the Complainant and the Property Owner must apportion the Tenant's electric bill for the period in question.

To apportion fairly, the Department must determine, as accurately as possible, the amount of electricity actually used by the Complainant during the violation period. The Department has held that unmetered usage should be determined by a customer's use over a test period; furthermore, the Department has found that the fairest and most representative method used to calculate the average usage should be an average taken over a period of time which is representative of an entire year. Andrews v. Commonwealth Electric Company, D.P.U/D.T.E. 96-AD-2, at 11 (2000). Since all of the Complainant's bills from the violation period include some usage by the adjacent apartment, these bills are not an accurate measure of the Complainant's typical monthly usage. Therefore, the Department must reject the Property Owner's proposal to calculate apportionment based on the Complainant's lowest monthly bill during the violation period. Since the bills that are certain to include only usage by the Complainant are the bills from the one-year period following the correction of the violation, and the Tenant testified that she did not change her consumption pattern after correction of the violation (Tr. at 20), the Department will use these bills to calculate the Complainant's typical monthly bill.

A review of the Complainant's billing history shows that during the year following correction of the violation, her average monthly bill was $31.35 (Exh. DTE-3).[3] The amount in dispute will be apportioned by multiplying $31.35 by 24 (the number of months in the violation period), and subtracting that amount from the total amount in dispute, $1,292.73. The result is that the Property Owner shall be liable for $540.33 of the total $1,292.73 bill, and the Tenant will remain responsible for $752.40. Therefore, the Property Owner shall pay to Hull the amount of $540.33. This amount may be paid as a lump sum or by five monthly installments of $100 and a sixth installment of $40.33, and payment shall begin within thirty days of the issuance of this Order. Hull is directed to refund the Tenant $540.33 to be paid as a lump sum within thirty days of this Order. Hull is also directed to take any actions necessary to apportion the disputed amount in the manner described above, and to inform the Department by letter of any such measures taken.

VI. ORDER

Accordingly, after due notice, hearing and consideration, it is

ORDERED: That Noreen Campadelli shall pay to Hull Municipal Lighting Plant the amount of $540.33. This amount shall be paid as a lump sum or by five monthly installments of $100 and a sixth installment of $40.33. Payment shall begin within thirty days of the issuance of this Order; and it is

---

[3] The average monthly bill was determined by adding all the Tenant's monthly bills for one year (April 1999 through March 2000), the sum of which is $376.03, and dividing that total by twelve months, the quotient of which is $31.35 per month.

FURTHER ORDERED: That Hull Municipal Lighting Plant is directed to refund to Deborah Canniff the amount of $540.33. This amount shall be paid as a lump sum within thirty days of the issuance of this Order; and it is

FURTHER ORDERED: That Hull Municipal Light Plant is directed to take any actions necessary to apportion the disputed amount in the manner described above, and to inform the Department by letter of any such measures taken.

By Order of the Department,

_____
Paul B. Vasington, Chairman

_____
James Connelly, Commissioner

_____
W. Robert Keating, Commissioner

_____
Eugene J. Sullivan, Jr., Commissioner

_____
Deirdre K. Manning, Commissioner

Appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. (Sec. 5, Chapter 25, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971).